88-791

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM 1988

$173,081.04 IN U.S. CURRENCY AND ONE PERSONAL CHECK DRAWN BY JAIME BUENDIA IN THE AMOUNT OF $21,128.06, AND RAUL ARVIZO-MORALES & CASA DE CAMBIO JUAREZ,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1) Whether Petitioners' monies can be forfeited, pursuant to 31 United States Code, Section 5317 (c), due to a material misrepresentation or omission on U.S. Customs form 4790 when the misrepresentation or omission was the result of accident, mistake or other innocent reason committed by the Petitioners.

2) Whether an oral declaration made by the Petitioners prior to the discovery of any material omission or misrepresentation on U.S. Customs form 4790 prohibits the forfeiture of Petitioners' U.S. Currency.

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1. This forfeiture action was commenced by the United States Attorney for the Western District of Texas, Helen M. Eversburg and the Assistant United States Attorney for the Western District of Texas, Mark M. Greenburg.

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IN THE
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, RAUL ARVIZO-MORALES, CASA DE CAMBIO JUAREZ and $173,081.04 in U.S. Currency and One Personal Check drawn by Jaime Buendia in the amount of $21,128.06, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals and Reproduced herein as Appendix A, was reported at 835 F.2d 1141. The opinion of the District Court and Reproduced herein as Appendix B, was reported at 652 F.Supp. 1568.

JURISDICTION

On February 9, 1987, the United States District Court for the Western District of Texas entered a judgment (Appendix C herein) forfeiting the U.S. Currency belonging to Petitioners. The judgment of the Court of Appeals was entered on January 22, 1988. A petition for rehearing was denied on April 13, 1988 (Appendix D herein). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) 31 United States Code, Section 5317 (c)[2] provides in pertinent part as follows:

> If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property . . . may be seized and forfeited to the United States Government.

2) 31 C.F.R. Sec. 103.25 (b) provides in pertinent part as follows:

> . . . reports required to be filed . . . shall be filed at the time of entry into the United States . . . unless otherwise directed or permitted by the Commissioner of Customs.

3) 19 C.F.R. Sec. 148.16 provides in pertinent part as follows:

> . . . an amendment to a customs declaration . . . may be made after inspection has begun but before any undeclared articles have been found if there is no fraudulent intent by the individual.

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2. Subsection (c) of 5317 was enacted on October 27, 1986 and merely recodified subsection (b) of 5317.

STATEMENT OF THE CASE

Raul Arvizo-Morales was employed by Casa de Cambio Juarez, a money exchange operation located in Juarez, Mexico. His brother Francisco is a principal owner of the business. Raul Arvizo's duties included transporting money, both dollars and pesos, back and forth across the United States/Mexico border. Prior to the fateful April 23, 1986 trip, he had brought currency into the United States without incident on more than 100 occasions. He did so on a regular, tedium-latent business.

On the morning of April 23, 1986 Francisco told Raul to take certain funds to the Texas Commerce Bank in El Paso. The cash and checks were counted and Raul prepared Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments. The correct total of the deposit, including certain non-negotiable instruments for which there was no obligation to declare, and the Texas Commerce Bank destination were noted on the form.

Just as Raul was prepared to leave, Francisco told him that there had been a transaction with Don Peso's Money Exchange House in El Paso and Casa de Cambio owed Don Peso's $19,865.04. Francisco instructed his brother to count out that money from the sums he had for deposit and to take it to Don Peso's when he made the trip to the El Paso Bank. Raul complied and put $20,865.04[3] in a separate paper bag. The rest of the funds were in a nylon bag.

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3. Although the government sought to make something sinister of this $1,000 error, the trial court considered it an inadvertent error, a simple miscount. The record fully supports that finding. Anyone who has counted currency knows that errors of $0.10, 1.00, 10.00, 100.00, and 1,000 are the easiest to make and the most frequently made.

When Raul arrived at the Paso Del Norte port of entry he presented the completed Form 4790 and his personal identification to the custom agent. The agent examined the identification and the form and then instructed Raul to bring in the funds for verification. Raul went to his vehicle and returned with both the nylon bag and the paper sack. At this point, before the money had been counted, the agent asked if all of the money was going to the Texas Commerce Bank. Raul responded: "Yes, except for the contents of the brown paper sack" which he explained he was to take to Don Peso's Money Exchange. When asked why he had not put that on the form Raul shrugged his shoulders. He then requested permission to add that additional destination to the form. The agent summarily denied the request, seized all of the currency and contacted the United States Attorney's Office.

Interestingly enough the agent was most concerned, at the time of the seizure and trial, with the miscount of the funds in the paper sack. Apparently so was Raul, but one could understand his concern entirely separate from compliance with the requirements of the currency disclosure law. He had made that $1,000 error. He had to account for it to his employer-brother.

The district court concluded that Petitioners had knowingly violated the statute and that the customs agent was not obligated to allow the oral amendment made by Petitioners concerning the error on the form 4790.

On appeal, a divided court of Appeals affirmed, but modified, the judgment. The court stated that the Statutory language did not require an examination of the party's

mental state and that 19 C.F.R. Sec. 148.16 has no application in currency forfeitures.[4]

Judge Politz dissented on the grounds that when Petitioner handed the customs agent the form 4790, the matter was *not* immediately and irretrievably fixed in stone with no room for innocent error or omission, or the correction of same. Judge Politz further concluded that the purpose of the currency disclosure legislation was not served by the harsh guidelines and result set down by the majority opinion.

REASONS FOR GRANTING THE PETITION

1) WHETHER PETITIONERS' MONIES CAN BE FORFEITED DUE TO A MATERIAL MISREPRESENTATION OR OMISSION ON U.S. CUSTOMS FORM 4790 WHEN THE MISREPRESENTATION OR OMISSION WAS THE RESULT OF ACCIDENT, MISTAKE OR OTHER INNOCENT REASON COMMITTED BY THE PETITIONERS

A. *Statutes & Regulations*

Federal law required that any person who imports or exports monetary instruments worth more than $10,000.00 at one time file a written report of that transaction on a form promulgated by the Secretary of the Treasury. 31 U.S.C. Sec. 5316. The term monetary instruments is defined to include both United States currency and bearer negotiable instruments. 31 U.S.C. Sec. 5312 (a) (3). The report must reflect the amount and kind of monetary instruments being transported, the origin, destination and route of the monetary instruments, and the identities of the persons who

4. Jurisdiction was conferred upon the Court of Appeals pursuant to 28 U.S.C. Sec. 1291, *et. seq.*

originated the transportation and who are to receive the monetary instruments 31 U.S.C. Sec. 5316. Monetary instruments transported into or out of the United States without a form being filed, or with respect to which a form is filed that contains material misstatements or omissions, are subject to seizure and forfeiture. 31 U.S.C. Sec. 5317 (c); 31 C.F.R. Sec. 103.48.

Section 5316 of 31 U.S.C., and the civil forfeiture provisions are part of the Currency and Foreign Transactions Reporting Act of 1970. The purpose of the Act is to require reports of foreign transactions where such reports would be helpful in investigation of criminal, tax, and regulatory violations. *Senate Committee on Banking and Currency*, S. Rep. No. 1139, 91st. Cong., 2d Sess. 7 (1970) (hereinafter cited as *Senate Report*); *House Committee on Banking and Currency*, H.R. Rep. No. 975, 91st Cong. 2d Sess. 19-20, reprinted in 1970 U.S. Code Cong. and Ad. News 4405-05 (hereinafter cited as *House Report*). The Act is aimed solely at obtaining reports of certain transactions. See id.; *Senate Report* at p. 7. There is nothing illegal in transporting currency across the border. *Only the failure to report* gives rise to any liability in cases that have been decided by Circuit Courts. *United States v. Warren*, 612 F.2d 887 (5th Cir. 1980) (*en banc*), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980); *United States v. Granda*, 565 F.2d 922 (5th Cir. 1978); *United States v. Hernandez*, 639 F.Supp. 629 (E.D.N.Y. -1986); *United States v. One Hundred Twenty Two Thousand Forty Three Dollars ($122,043.00) in U.S. Currency*, 792 F.2d 1470 (9th Cir. 1986); *United States v. Gonzalez-Medina*, 797 F.2d 1109 (1st Cir. 1986); *United States v. Twenty Thousand Seven Hundred Fifty Seven Dollars and Eighty Three Cents ($20,757.83) Canadian Currency*, 769 F.2d 479 (8th Cir. 1985); *United States v. Valdez-Guerra*, 758 F.2d 1411 (11th Cir. 1985).

31 C.F.R. Sec. 103.25 (b) provides that . . . "reports required to be filed by 31 C.F.R. Sec. 103.23 (b) shall be filed at the time of entry into the United States . . . unless otherwise directed or permitted by the Commissioner of Customs." It is therefore clear that an individual who enters or exits the United States and is transporting more than $10,000.00, must file the Form 4790 at the time of entry or exit. However, 19 C.F.R. Sec. 148.11 provides that a "declaration must be made . . . before examination has begun, but, 19 C.F.R. Sec. 148.16 modifies these provisions by allowing amendment after inspection has begun but before any undeclared articles have been found if there is no fraudulent intent by the individual". Therefore, it is abundantly clear that 31 C.F.R. Sec. 103.25 (b) or any other regulation *does not preclude an individual, who has filed a report upon entry into the United States, from amending, either orally or in writing, his previously filed report.*

B. ***Elements of the Statute***

Although this Court has not specifically answered the question as to whether the Government, in a forfeiture action under Section 5317, must plead and prove that the person importing the currency acted with knowledge of the reporting requirement, the District Court and the Eleventh Circuit, both relying upon Fifth Circuit authority, have held that knowledge is a requirement. *United States v. One Lot of $24,900 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985). However, since this case is not a "failure to report" case, that argument becomes moot. It is obvious that Petitioners were aware of the reporting requirement. However, the District and Circuit Court erroneously held that Petitioners' failure to list DON PESOS as a designatee of part of the currency (misstatement) was knowingly done. It is respectfully submitted that *knowledge* of the misstatement or omission is an element of the alleged violation, and must be

proven by a preponderance of the evidence. *United States v. $48,595.00*, 705 F.2d 909 (7th Cir. 1983). The legislative history of Section 5316 and the Civil Forfeiture provisions indicate that Congress intended knowledge of the reporting requirements to be an element of a forfeiture action. As the Senate Committee on Banking and Currency stated:

> "The purpose of this Chapter is to require reports on currency exports and imports and not to limit or impede the free flow of currency in international commerce. No one would be prevented from taking currency out of or into the country in whatever amounts he desired as long as the reporting requirements were observed . . . this legislation should in no way be interpreted as the beginning of exchange controls . . . in enacting the currency reporting statutes . . . Congress sought to *avoid damage to international trade and commerce.*" (emphasis added).

In *$24,900, supra*, the following language also appeared:

> "In *Warren*, 612 F.2d at 891, the Fifth Circuit, *en banc*, cited this portion of legislative history as a reason for holding that knowledge of the reporting requirements is an element in a criminal prosecution . . . This reasoning applies with equal force in the forfeiture context. Failure to require knowledge of the reporting requirements could well impede the mobility of international capital into and out of the United States. *A signal would be sent that United States law may well be filled with booby traps that spring without warning to grab the*

> *currency of unsuspecting travelers.* (emphasis added).

The emphasized words above clearly reflect the outcome imposed upon Petitioners by the Circuit Court. There is no question that Petitioner ARVIZO-MORALES knew how to fill out the Form 4790 and that he knew, albeit at the last moment, that part of the U.S. Currency was going to DON PESOS MONEY EXCHANGE HOUSE. However, it is painfully obvious that his failure to list DON PESOS on his previously prepared 4790 Form, was not knowingly done, but by innocent inadvertence or mistake. Innocent mistakes, such as this one, when committed during spur of the moment activities in a business enviornment, are distinguishable from "errors" knowingly made with the intent to violate the law. "Knowledge" means that the error or act was done voluntarily and intentionally and not because of accident or mistake, and "Intentionally" means that an individual did something which the law forbids, purposely intending to violate the law. Devitt and Blackmar, *Federal Jury Practice and Instructions*. If Petitioner ARVIZO-MORALEZ was knowingly intending to omit DON PESOS as an additional point of destination of part of the money by not listing it on his Form 4790, it would be inconsistent and illogical from him to then voluntarily, and wihtout solicitation, tell the agent about his additional destination and then request to amend the Form. It would be a bitter and unjust decision to hold, that Petitioners knowingly violated the statute, and order forfeiture. This type of edict would be one that should be expected in countries that condone deception and fraudulent acts, and not from a nation that encourages honesty and fair play. The evidence has revealed an attitude, on the part of Petitioners, of concern and conscientiousness toward the laws of the United States. To order forfeiture of $173,041.04 (which is inventory and not profits to Petitioners) in U.S. Currency, merely because Petitioners innocently forgot to

fill in the name of an additional institution as a point of destination (which became known to Petitioner at the last moment before departure), but, who nevertheless informed the customs agent of this fact before any inspection had begun, would have a devastating and unjust effect on the Petitioners and all other travelers who might make the same error (e.g. what if a traveler innocently omits putting his date of birth on the form or doesn't date the form). Clearly, this was not the intent of Congress when it passed this statute.

2) WHETHER AN ORAL DECLARATION MADE BY THE PETITIONERS PRIOR TO THE DISCOVERY OF ANY MATERIAL OMISSION OR MISREPRESENTATION ON U.S. CUSTOMS FORM 4790 PROHIBITS THE FORFEITURE OF PETITIONERS' U.S. CURRENCY.

As previously noted, Petitioner Arvizo-Marales had contended that he had innocently and inadvertently forgotten to list Don Pesos as a point of destination of part of the currency on the 4790 Form after leaving his place of business en route to the United States. The facts and circumstances of the case corroborate this assertion in the following particulars: (1) all of the currency would have been deposited at Texas Commerce Bank (the designatee on the form) had not Petitioner's brother informed him, immediately before his departure to the United States, that because of Casa de Cambio's purchase earlier that morning of Mexican pesos from Don Pesos Money Exchange House, they now owed U.S. Currency to Don Pesos for that sale and had agreed to deliver same to his place of business in El Paso, Texas. (2) that because Petitioner is a human being and not a machine, he is capable of making an error------specifically, after segregating the U.S. Currency that was to be paid to

Don Pesos, he inadvertently forgot to list that institution on the previously prepared 4790 Form; (3) that after arriving at the Paso Del Norte Bridge, and while reviewing the contents of his Form 4790 with agent Payan he remembered, for the first time, that he had not listed Don Pesos, along with Texas Commerce Bank, as a point of destination of part of the money, so he immediately informed agent Payan of this fact, and (4) that if Petitioner were knowingly omitting that information from his Form, as opposed to omitting it because of inadvertence, mistake, or accident, he certainly would not call it to the attention of the agent so that he could now suffer the punishment and hardship he has been dealt to date.

Since there is no case law dealing with forfeiture due to material misstatements or omissions under 31 U.S.C. Sec. 5317 (b) (c), analogies must be drawn from cases of a similar nature or involving similar issues. In *United States v. 66 Pieces of Jade and Gold Jewelry, etc.*, 760 F.2d 970 (9th Cir. 1985), Claimant Warren Anderson, upon his entry into the United States, was asked, on two (2) separate occasions if he was transporting anything into the United States that had to be declared, i.e. anything of value. When no declaration was made, Anderson was directed to secondary inspection where, again, he made no declaration concerning the expensive pieces of Jade and Gold that he was bringing into the United States. And although that forfeiture action arose out of 19 U.S.C. Sec. 1497, the language of the Ninth Circuit opinion has applicability to the case at bar. Judge Hall enunciated the following concerning oral declarations:

> "WARREN argues that he did not violate Sec. 1497 because he was not given an opportunity to declare the jewelry or to amend his declaration. The district court found that WARREN had an opportunity to declare the

> jewelry, and an opportunity to amend. These factual findings are not clearly erroneous. . . . Section 1497 and 19 C.F.R. Sec. 148.11 (1984) require a declaration by the traveler before examination of baggage has begun, and 19 C.F.R. Sec. 148.16 (1984) modifies these provisions by allowing amendment after inspection has begun but before any undeclared articles have been found, if there is no fraudulent intent by the traveler." at p. 974.

In the case at bar, Petitioner Arvizo-Morales, upon his recollection that he had forgotten to list Don Pesos as a designatee of part of the currency, immediately amended his declaration (Form 4790) prior to agent Payan commencing his inspection of the currency and checks that Petitioners were declaring upon entry into the United States, by informing him that the currency which had been segregated into the brown grocery bag was destined for Don Pesos. Moreover, he even inquired if he could write this information in the appropriate space on the form. Agent Payan said that it was not necessary, and commenced counting the currency. Clearly, Petitioner Arvizo-Morales made this voluntary, unsolicited, and honest declaration prior to the commencement of any inspection by agent Payan of the currency, and, certainly before any discovery of the $1,000.00 error and/or that a portion of the currency was destined for a place other than Texas Commerce Bank.

As heretofore, noted, the provisions of 19 C.F.R. Sec. 148.16 should be applicable to this case because there is no regulation or case law, either under the Bank Secrecy Act or the Tariff Act, which precludes its acceptance in a forfeiture action under Sec. 5317 (b) (c). In addition, the only relevant case law dealing with forfeiture arise under 19 U.S.C. Sec. 1497 and "failure to report cases" under

31 U.S.C. Sec. 5317 (b). It is painfully obviously that agent Payan did not feel that Petitioner had any fraudulent intent concerning his Form 4790 or his oral amended declaration. If that opinion existed, he would have *immediately* seized the currency and listed same as a reason for the seizure.

Also, as previously noted, 31 C.F.R. Sec. 103.25 (b) requires that a report be filed at the time of entry into the United States; but, it does *not preclude* an oral amended declaration made pursuant to 19 C.F.R. Sec. 148.16 or a request to correct the Form 4790 before any violations are discovered and there is no fraudulent intent on the part of the traveler. *United States v. $47,980.00 in Canadian Currency*, 726 F.2d 532 (9th Cir. 1984).

CONCLUSION AND PRAYER

Forfeiture is a principle that is not to be favored by the Courts and is to only be utilized in the narrowest and clearest of circumstances. For the reasons and arguments advanced herein, forfeiture should not be had in this cause. To affirm the harsh and unjust judgment that has been levied on Petitioners is not only contrary to the evidence presented and the intent of the law, but it creates an unfavorable stigma on the actions of our government in dealing with innocent and honest foreign businessmen who are sincerely trying to comply with the spirit and intent of our laws.

Respectfully submitted,

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APPENDICIES

UNITED STATES of America,
Plaintiff-Appellee,

v.

$173,081.04 IN U.S. CURRENCY AND ONE PERSONAL CHECK DRAWN BY JAIME BUENDIA IN THE AMOUNT OF $21,128.00, Defendant,

and

Raul Arvizo-Morales & Casa de Cambio Juarez, Claimants-Appellants.

No. 87-1132.

United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1988.

The United States sought forfeiture of monetary instruments due to failure of person transporting instruments from Mexico to the United States to comply with reporting requirements. The United States District Court for the Western District of Texas, Harry Lee Hudspeth, J., 652 F.Supp. 1468, entered judgment in favor of United States, and claimants of monetary instruments appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) nonnegotiable checks were not required to be reported on customs form entitled Report of International Transportation of Currency or Monetary Instruments; (2) for purposes of forfeiture of monetary instruments for failure to comply with statutory requirement of filing report, monetary instruments became subject to forfeiture when transporter tendered materially incorrect customs form to customs agent,

regardless of whether reporting error was intentional or inadvertent; and (3) all monetary instruments being transported in one batch were subject to seizure and forfeiture due to failure of transporter to comply with reporting requirements with respect to portion of instruments.

Affirmed as modified.

Politz, Circuit Judge, filed dissenting opinion.

1. **United States KEY 34**

Nonnegotiable checks are not required to be reported on customs form entitled Report of International Transportation of Currency or Monetary Instruments. 31 U.S.C.A. § 5312(a)(3).

2. **United States KEY 34**

For monetary instrument to be subject to forfeiture for failure to file statutorily required report regarding transportation of monetary instrument, only material misstatement or omission is necessary; examination of party's mental state is not required. 31 U.S.C.A. §§ 5316, 5317(c).

3. **United States KEY 34**

Monetary instruments became subject to forfeiture for failure to file statutorily required report regarding transportation of instruments when materially incorrect customs form entitled Report of International Transportation of Currency or Monetary Instruments was tendered, regardless of whether reporting error was intentional or inadvertent. 31 U.S.C.A. §§ 5316, 5317(c).

4. Forfeitures KEY 3

All monetary instruments being transported in one batch from Mexico to United States were subject to seizure and forfeiture due to failure of transporter to comply with reporting requirements with respect to a portion of the instruments, and federal judiciary had no statutory authority to reduce forfeiture amount to limit forfeiture to money with respect to which reporting requirements had not been complied with, as only Secretary of the Treasury has discretion to remit any or all of the forfeited funds. 31 U.S.C.A. §§ 5317(c), 5321(c).

Richard D. Esper, Mitchell Esper, El Paso, Tex., for claimants-appellants.

Mark M. Greenberg, Asst. U.S. Atty., Helen M. Eversberg, U.S. Atty., El Paso, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REAVLEY, POLITZ, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

Claimants appeal the district court's judgment that they must forfeit $194,209.04 for violating the Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5311 *et seq.* Although the result in this case is undeniably harsh, as are most forfeiture actions, we are constrained to affirm with a modification.

FACTS

Raul Arvizo-Morales is an employee at Casa de Cambio Juarez, a monetary exchange business located in Juarez, Mexico. On April 23, 1986, Arvizo-Morales completed Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments, indicating that Casa de Cambio was depositing currency of $172,081.04 and checks totalling $70,772.55 into its account at Texas Commerce Bank (TCB) in El Paso.[1] Just before Arvizo-Morales left to make the deposit, Francisco Arvizo-Morales, a principal owner of Casa de Cambio and Raul's brother, told him to take $19,685.04 from the total currency and deliver it to Don Peso's Money Exchange House for payment of pesos purchased by Casa de Cambio from Don Peso's a day earlier. Arvizo-Morales then placed $19,685.04 in a separate bag and left for El Paso without revising Form 4790 to indicate that the money was being taken to two destinations.

[1] Arvizo-Morales presented Form 4790 to Customs Agent Marcos Payan at the border. When asked whether the information on Form 4790 was correct, Arvizo-Morales said yes. At Payan's request, Arvizo-Morales walked back to his vehicle and returned to the Customs office with the two bags of money. When Payan asked whether the money in both bags was being taken to TCB Arvizo-Morales indicated that the bag containing $19,685.04 was being taken to Don Peso's. Payan then counted $20,685.04 in the separate bag. Both Payan and Arvizo-Morales then recounted the money and still noted a $1,000 difference. Payan then declined

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1. Arvizo-Morales completed From 4790 because he was transporting monetary instruments of more than $10,000 into the United States. *See*, 31 U.S.C. § 5316(a)(1)(B). He previously had completed dozens of these forms.

Arvizo-Morales' request to modify Form 4790[2] and seized all of the currency and checks.[3] Payan testified that he had three reasons for seizing the money: The report did not list Don Peso's as a destination, the report did not indicate that Arvizo-Morales was acting as an agent for Don Peso's and the reported amount of money was off by $1,000.

The district court ordered forfeiture of all of the currency and the single negotiable check for $21,128.06 after concluding that the claimants' failure to list Don Peso's as a destination was a material misstatement or omission that was knowingly made,[4] 652 F.Supp. 1468. We address two issues on appeal: whether the Government was required to prove that the claimants knowingly failed to list Don Peso's as a destination, and whether only that portion of the money destined for Don Peso's should have been forfeited.

INTENT TO MISREPRESENT OR OMIT

The district court, relying on numerous facts, concluded that the claimants filed Form 4790 knowing that it contained a material omission or misstatement. The claimants concede that their failure to list Don Peso's as a destination was

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2. The record is unclear whether Arvizo-Morales requested to modify the amount, the destination, or both.

3. Payan subsequently returned checks totalling $49,644.49 because they were non-negotiable. Non-negotiable checks are not required to be reported on Form 4790. *See* 31 U.S.C. § 5312(a)(3).

4. The district court did not support its forfeiture decision by relying upon Payan's additional reasons for seizing the money, nor does the Government urge those other reasons on appeal.

material. *See* 31 U.S.C. § 5316(b). They allege, however, that such failure was not knowingly done but was the result of an accident, inadvertent mistake, or innocent error. They point out numerous facts to buttress their contention.

[2, 3] Whether the facts indicate that the claimants' failure to list Don Peso's as a destination was intentional or inadvertent is irrelevant. At the time of this event, 31 U.S.C. § 5317(c) provided in relevant part: "A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument . . . has not been filed or contains a material omission or misstatement."[5] We have held that a party must have knowledge of the reporting requirements before his money is subject to forfeiture under § 5317(c). *See United States v. Granda*, 565 F.2d 922 (5th Cir. 1978); *see also United States v. One Lot of $24,900 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985); *United States v. $48,595*, 705 F.2d 909 (7th Cir. 1983); *But see United States v. $359,500 in United States Currency*, 828 F.2d 930 (2d Cir. 1987); *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986); *United States v. $20,757.83 in Canadian Currency*, 769 F.2d 479 (8th Cir. 1985). These cases offer no assistance here, however, because this is not a failure-to-report case. Rather, these claimants, well aware of the reporting requirements, nevertheless filed a report containing a material misstatement or omission. Section 5317(c) only requires that the misstatement or omission be "material" before the filing

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5. Section 5317(c) was amended in October 1986 and now reads as follows: "If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government . . . ."

party's money becomes subject to forfeiture. The statutory language does not require examination of the party's mental state and the district court's finding of a "knowing" misstatement was therefore unnecessary. *Cf.* § 5316(a) ("knowingly transports"); § 5322(a) & (b) ("willfully violating"). Under the clear and unambiguous language of § 5317(c), the claimant's money became subject to forfeiture when Arvizo-Morales tendered the materially incorrect Form 4790 to Payan, regardless of whether the reporting error was intentional or inadvertent.

Claimants argue that under regulations applicable to tariff collection, 19 C.F.R. § 148.16, a declaration made before examination of one's baggage has begun may be amended after the commencement of the inspection if undeclared articles have not yet been found and the officer perceives no fraudulent intent. They would have their conduct tested against this standard. Although the Treasury Department might sensibly promulgate a regulation permitting amendments to Form 4790 reports for the purpose of correcting inadvertent errors, it has not done so, and there is no suggestion in the language of 19 C.F.R. § 148.16 or elsewhere that renders it susceptible to application in currency forfeitures. We cannot accept this defense.

FORFEITURE

[4] The claimants alternatively contend that because the reporting violation found by the district court concerns only the funds destined for Don Peso's, only those funds should subject to forfeiture. This argument is appealing, especially because the record overwhelmingly suggests that the reporting error was simply an oversight and would never have come to the Government's attention but for the candor of Arvizo-Morales, We agree with the district court, however, that the

federal judiciary has no statutory authority to reduce the forfeiture amount in this case.[6]

As the district court noted, 31 C.F.R. § 103.48, enacted pursuant to the Currency and Foreign Transactions Reporting Act, provides:

> Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required . . . are subject to seizure and forfeiture to the United States if such report . . . contains material omissions or misstatements. *The Secretary [of the Treasury] may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.* (emphasis added)[7]

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6. Whether the forfeiture amount could sustain constitutional attack is not before us, as claimants have raised no constitutional challenges in this case. *Cf. United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987) (RICO forfeitures may violate Eighth Amendment); *but see United States v. Grande*, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 830, 101 S.Ct. 98, 66 L.Ed.2d 35 (1980).

7. *See also* 31 U.S.C. § 5317(c) (Monetary instruments being transported may be seized and forfeited if report is materially incorrect); 31 U.S.C. § 5321(c) ("The Secretary may remit any part of a forfeiture" under § 5317(c)). In the absence of 31 U.S.C. § 5321(c) or 31 C.F.R. § 103.48, "the Secretary would be unable to correct an injustice if evidence came to light that a penalty which had been paid had been unjustly imposed." H.Rep.No. 91-975, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin.News 4394, 4408. *See also* S.Rep.No. 91-1139, 91st Cong., 2d Sess. at 7 (1970) (The Secretary has discretion to remit any part of a forfeiture "to prevent ordinary citizens or businessmen from being unduly penalized for an inadvertent violation.").

This regulation indicates that all money associated with the materially incorrect report is subject to forfeiture and that only the Secretary of the Treasury has discretion to remit any or all of the forfeited funds. By negative implication, no power to ameliorate an individual forfeiture has been conferred on the federal courts. Claimants cite no authority supporting their position, and this court has previously rejected imposing a partial forfeiture. *United States v. Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980).

The claimants argue that the unfairness of forfeiture is compounded because they were never given an opportunity to request mitigation of forfeiture from the Secretary of the Treasury, and are precluded from doing so now, since the Government removed the claim from administrative review by filing its complaint in federal district court only eight days after the funds were seized. We can find no federal statute or regulation barring administrative review of a claim once a party has filed a complaint in federal district court. In view of the twin facts that the claimants had the right to contest the propriety of the forfeiture and that we have no authority to order partial forfeiture, we see no reason why claimants' claim for administrative relief has been waived by awaiting the outcome of this case. Our decision is thus entered without prejudice to claimants' exercise of administrative remedies.[8]

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8. The Currency and Foreign Transactions Reporting Act vests the Commissioner of Customs with authority to enforce compliance with the reporting and forfeiture provisions at issue here. *See* 31 C.F.R. § 103.46(b)(7). We will not speculate on the precise administrative procedure that applies here, observing only that one Customs statute, if it applies, provides that a person whose property has been seized can petition the Secretary of the Treasury for redress. *See* 19 U.S.C. § 1618. A regulation enacted pursuant to 19 U.S.C. § 1618 provides that the claimant must file his petition for relief "within 30 days from the date of the mailing of the notice of fine, penalty, or forfeiture

The judgment of the district court is AFFIRMED as modified.

POLITZ, Circuit Judge, dissenting:

We today affirm the forfeiture of $194,209.04 because of an innocent omission which, on the record before us, reflects neither deviousness nor effort to subvert the regulatory statute at issue. Convinced that we do an injustice, I must dissent.

Raul Arvizo-Morales was employed by Casa de Cambio Juarez, a money exchange operation located in Juarez, Mexico. His brother Francisco is a principal owner of the business. Raul Arvizo's duties included transporting money, both dollars and pesos, back and forth across the United States/Mexico border. Prior to the fateful April 23, 1986 trip, he had brought currency into the United States without incident on more than 100 occasions. He did so on a regular, tedium-latent basis.

On the morning of April 23, 1986 Francisco told Raul to take certain funds to the Texas Commerce Bank in El Paso. The cash and checks were counted and Raul prepared Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments. The correct total of the deposit, including certain non-negotiable instruments for which there was no obligation to declare, and the Texas Commerce Bank destination were noted on the form.

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8. (Continued)

incurred. 19 C.F.R. § 171.12(b). According to 19 C.F.R. § 162.31(a), the notice of forfeiture must inform the claimant that he can seek relief under 19 U.S.C. § 1618 or any other applicable statute authorizing remission of forfeitures.

Just as Raul was preparing to leave, Francisco told him that there had been a transaction with Don Peso's Money Exchange House in El Paso and Casa de Cambio owed Don Peso's $19,865.04. Francisco instructed his brother to count out that amount from the sums he had for deposit and to take it to Don Peso's when he made the trip to the El Paso Bank. Raul complied and put $20,865.04[1] in a separate paper bag. The rest of the funds were in a nylon bag.

When Raul arrived at the Paso Del Norte port of entry he presented the completed Form 4790 and his personal identification to the custom agent. The agent examined the identification and the form and then instructed Raul to bring in the funds for verification. Raul went to his vehicle and returned with both the nylon bag and the paper sack. At this point, before the money had been counted, the agent asked if all of the money was going to the Texas Commerce Bank. Raul responded: "Yes, except for the contents of the brown paper sack" which he explained he was to take to Don Peso's Money Exchange. When asked why he had not put that on the form Raul shrugged his shoulders. He then requested permission to add that additional destination to the form. The agent summarily denied the request, seized all of the currency and contacted the United States Attorney's office.

Interestingly enough the agent was most concerned, at the time of the seizure and trial, with the miscount of the funds in the paper sack. Apparently so was Raul, but one could understand his concern entirely separate from compliance

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1. Although the government sought to make something sinister of this $1,000 error, the trial court considered it an inadvertent error, a simple miscount. The record fully supports that finding. Anyone who has counted currency knows that errors of $0.10, 1.00, 10.00, 100.00, and 1,000.00 are the easiest to make and the most frequently made.

with the requirements of the currency disclosure law. He had made that $1,000 error. He had to account for it to his employer-brother.

The majority today holds that when Raul handed the agent the Form 4790 the matter was immediately and irretrievably fixed in stone with no room for innocent error or omission, or the correction of same. When the form was handed over, it was a done deed. No correction or repair was possible. I do not perceive the act of handing over a form as a final commitment to a course of action like a bullet leaving the end of the barrel of a gun. Fact-specific justice requires more. The purpose of the currency disclosure legislation is not served by today's harsh result. I am unable to fathom any purpose which is served other than to punish Raul and his employer for what is an oversight or, at worst, slovenly completion of a form. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

No. EP-86-CA-136

UNITED STATES OF AMERICA,

Plaintiff,

v.

$173,081.04 IN U.S. CURRENCY
AND ONE PERSONAL CHECK DRAWN
BY JAIME BUENDIA IN THE
AMOUNT OF $21,128.00

Defendants.

FILED
Charles W. Vagner
(illegible)
By s/s V. Cabrera
DEPUTY
(stamp)

MEMORANDUM OPINION AND ORDER

This is a civil action for the forfeiture of monetary instruments pursuant to 31 U.S.C. § 5317(c). On April 23, 1986, representatives of the United States Customs Service seized the Defendant currency and check from one Raul Arvizo in El Paso, Texas. The Plaintiff United States of America filed a complaint for forfeiture, which was contested by the Claimants Raul Arvizo-Morales and Casa de Cambio Juarez. The case was tried to the Court without a jury. The Court's findings of fact and conclusions of law are incorporated in this opinion.

Claimant Casa de Cambio Juarez is a money exchange house located at 2675 East 16th of September Avenue in Juarez, Mexico. It is engaged in the business of exchanging dollars for pesos and vice versa. Francisco Arvizo is one of the principal owners of Casa de Cambio and his brother, Claimant Raul Arvizo, is an employee of the exchange house. Casa de Cambio maintains a bank account in El Paso, Texas for the purpose of depositing dollars which it receives in exchange for Mexican pesos. On April 23, 1986, Raul Arvizo was delegated to transfer a quantity of currency and a number of checks from Juarez to El Paso. Arvizo arrived at the Paso Del Norte port of entry at approximately 1:00 p.m. bearing $173,081.04 in currency and the $21,128.00 check which together became the subject matter of this forfeiture action. Arvizo went to the Customs Office and presented a completed Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments (Pl. Ex. 1). Part III of the form reported that Arvizo was importing $172,081.04 in currency and checks totaling $70,772.55. Customs Agent Marcus Payan, who received the Form 4790, asked Arvizo to show him the currency and checks. Arvizo told Payan that he had left the money and checks in his pickup truck, so he went back outside to get it. When Arvizo reappeared, he had in his hands a red nylon bag and a brown paper grocery sack. The grocery sack contained $20,685.04 in currency; the remaining currency and all of the checks were contained in the red nylon bag. The Form 4790 filed by Arvizo reported that the destination of all the money was the Texas Commerce Bank in El Paso, Texas. In checking the form for accuracy, Payan asked Arviso whether the Texas Commerce Bank was in the fact the destination of all the money and checks. Arvizo replied that it was, except for the money contained in the brown paper sack. According to Arvizo, he was taking that money to the Don Peso's Money Exchange at 913 South Stanton Street. When asked by Payan why he had not reflected that information on the Form 4790, or prepared a second form, Arvizo

shrugged his shoulders and said he should have done so. Payan proceeded to count the money and checks, whereupon he discovered that the two bags combined contained currency in the amount of $173,081.04, or $1,000.00 more than reported on the Form 4790. At this point in the proceedings, Arvizo requested permission to change or modify the Form 4790. Instead, Payan decided to seize the money pursuant to 31 U.S.C. § 5317(c).

Federal law requires that any person who imports or exports monetary instruments worth more than $10,000.00 at one time file a written report of that transaction on a form promulgated by the Secretary of the Treasury. 31 U.S.C., § 5316. The term "monetary instruments" is defined to include both United States currency and bearer negotiable instruments. 31 U.S.C. § 5312(a)(3). The report must reflect the amount and kind of monetary instruments being transported, the origin, destination and route of the monetary instruments, and the identities of the persons who originated the transportation and who are to receive the monetary instruments. 31 U.S.C. § 5316(b). Monetary instruments transported into or out of the United States without a form being filed, or with respect to which a form is filed containing material misstatements or omissions, are subject to seizure and forfeiture. 31 U.S.C. § 5317(c); 31 C.F.R. § 103.48.

In the instant case, it is not disputed that Raul Arvizo was importing more than $10,000.00 worth of monetary instruments from Mexico into the United States; that the law required the filing of a report form, and that Arvizo actually filed a Form 4790. The issue presented is whether Arvizo knowingly filed a form containing omissions or misstatements, and, if so, whether the omissions or misstatements were material.

Monetary instruments which are being transported are not subject to seizure and forfeiture unless the person transporting them knowingly fails to comply with the reporting requirements. *United States v. $24,900.00 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985). In the instant case, the Plaintiff has carried its burden of proving that Raul Arvizo knowingly failed to comply with the law and regulations. Arvizo was well aware of his obligation to file a customs Form 4790 at the time he imported monetary instruments into the United States. In fact, the evidence shows that he had personally filed more than 100 such forms prior to April 23, 1986 (Pl. Ex. 5). Moreover, he was specifically aware of his reporting requirement with respect to the instant transaction, because he presented a Form 4790 to Customs officials at the Paso Del Norte Bridge at the time of entry. (Pl. Ex. 1) The Form 4790 filed by Arvizo purports to show that the destination of all the money and checks was the Texas Commerce Bank at Mesa and Stanton Streets in El Paso, Texas. When he was questioned by Customs Agent Payan, Arvizo admitted that this statement was not true. More than $19,000.00 was destined for the Don Peso's Money Exchange in El Paso. Furthermore, Arvizo was aware of this misstatement. According to his testimony, his brother, Francisco Arvizo, had informed him before his departure that he was to take $19,685.04 to Don Peso's to complete a exchange of pesos for dollars that had taken place earlier that day. Raul Arvizo had even segregated the funds to be delivered to Don Peso's by placing them in the brown paper grocery sack.[1] Finally, Raul Arvizo admitted in testimony that Casa de Cambio Juarez maintains a supply of Forms 4790 both in an English language and Spanish language version, and that he could have prepared

1. Raul Arvizo apparently miscounted the currency. The grocery sack actually contained $20,685.04.

a correct form before departing for El Paso. Clearly, therefore, Arvizo's misstatement was "knowingly" made, and the Court finds it was also "material." In fact, it related to matters which are central to the reporting requirement. The statute specifically requires that the bearer of the monetary instruments report their destination (31 U.S.C. § 5316(b)(2)) and the identity of the person who is to receive them (31 U.S.C. § 5316(b)(3)). If the Court were to hold that such disclosures were not material, the statutory scheme would largely be rendered meaningless.

Claimants contend that Raul Arvizo had the right to amend his Form 4790 after he admitted the misstatement, and that Agent Payan was obligated to allow the amendment. There is no support for this position in the law or regulations. Title 31 C.F.R. § 103.26(b) provides that: "[r]eports . . . shall be filed at the time of entry into the United States . . . ." In a case interpreting this regulation, *United States v. $47,980.00 in Canadian Currency*, 726 F.2d 532 (9th Cir. 1984), the Ninth Circuit stated at page 534:

> In our view, the statute and regulations clearly impose a duty to report at least by the time of inspection, and a failure to report at that time completes the violation. Any other construction would render enforcement difficult and would frustrate the congressional intent underlying the reporting requirement as well as the intent behind the statute authorizing forfeiture of monetary instruments "being transported" in violation of the reporting requirement.

Although the instant case involves the filing of a false report, rather than a failure to report, the reasoning of the Ninth Circuit is equally applicable. Arvizo had completed his entry

into the United States and had presented himself and his Form 4790 for inspection, and Payan was in the process of verifying the contents of the report when the misstatements were discovered. The violation was complete, and forfeiture of the monetary instruments was authorized.

The Claimants argue strenuously that if any forfeiture is ordered in this case, the Court should exercise its discretion to forfeit only the $19,685.04 that was destined for Don Peso's Money Exchange. Dicta in some of the reported cases does suggest that the trial court has discretion to order forfeiture of less than the entire amount of currency or other monetary instruments seized. *See United States v. $24,900.00 in U.S. Currency, supra* at 1533 n.8; *United States v. $48,595.00* , 705 F.2d 909, 913-14 (7th Cir. 1983). The preponderance of judicial authority, however, clearly favors forfeiture of the entire amount. *See United States v. Currency Totaling $48,318.08*, 609 F.2d 210, 215-16 (5th Cir. 1980); *United States v. $239,500.00 in U.S. Currency*, 764 F.2d 771 (11th Cir. 1985); *United States v. $11,580.00 in U.S. Currency*, 454 F.Supp. 376, 382-3 (M.D. Fla. 1978). Total forfeiture is further supported by the regulation promulgated by the Secretary of the Treasury pursuant to the statute, 31 C.F.R. § 103.48, which provides in pertinent part as follows:

> Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report . . . contains material omissions or misstatements. The Secretary may, *in his sole discretion, remit or mitigate any such forfeiture in whole or in part* upon such terms and conditions as he deems reasonable. (Emphasis added).

This regulation seems to make it clear that all the monetary instruments being transported in one "batch" are subject to seizure and forfeiture if a material misstatement or omission is made with respect to any part of the transaction, and that the Secretary of the Treasury, not the trial court, has the discretion to remit or mitigate forfeiture.

In light of the foregoing discussion, the Court finds that the Plaintiff United States of America is entitled to a judgment of forfeiture with regard to the $173,081.04 in currency and the check for $21,128.00.

It is therefore ORDERED that judgment be, and it is hereby entered in favor of the Plaintiff, and the $173,081.04 in currency and personal check drawn by Jaime Buendia in the amount of $21,128.00 be, and it is hereby, forfeited to the use and benefit of the United States.

SIGNED AND ENTERED this 9th day of February, 1987.

s/s Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

No. EP-86-CA-136

UNITED STATES OF AMERICA,

Plaintiff,

v.

$173,081.04 IN U.S. CURRENCY AND ONE PERSONAL CHECK DRAWN BY JAIME BUENDIA IN THE AMOUNT OF $21,128.00,

Defendants.

FILED
Feb 8 4:49 PM '87
(*illegible*), CLERK
By s/s V. Cabrera
DEPUTY
(stamp)

JUDGMENT

In accordance with the Memorandum Opinion and Order this day entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, entered for the Plaintiff, United States of America, and that the Defendants, $173,081.04 in U.S. Currency and one personal check drawn by Jaime Buendia in the amount of $21,128.00 be, and are hereby, FORFEITED to the use and benefit of the United States of America.

It is further ORDERED, ADJUDGED AND DECREED that the Claimants pay the costs of the suit.

SIGNED AND ENTERED this 9th day of February, 1987.

s/s Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1132

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

$173,081.04 IN U.S. CURRENCY,
Defendant,

and

RAUL ARVIZO-MORALES and
CASA DE CAMBIO JUAREZ,
Claimants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion JANUARY 22, 1988, 5 Cir., ___ , _____ F.2d _____)

(April 13, 1988)

Before REAVLEY, POLITZ and JONES, Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/s Edith H. Jones 3/31/88
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6
(stamp)

* Judge Politz would grant the rehearing for the reasons stated in his dissent.

(2)

No. 88-79

In the Supreme Court of the United States

OCTOBER TERM, 1988

$173,081.04 IN U.S. CURRENCY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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EDWARD S.G. DENNIS, JR.
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QUESTIONS PRESENTED

1. Whether a material misstatement or omission on a currency report must be knowingly made in order for the monetary instruments to be subject to forfeiture under 31 U.S.C. (Supp. III) 5317(c).

2. Whether a currency report under 31 U.S.C. (& Supp. III) 5316 may be orally amended after it is filed on entry into the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-79

$173,081.04 IN U.S. CURRENCY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-12A) is reported at 835 F.2d 1141. The opinion of the district court (Pet. App. 13A-19A) is reported at 652 F. Supp. 1468.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. A petition for rehearing was denied on April 13, 1988. The petition for a writ of certiorari was filed on July 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government instituted this action for civil forfeiture under 31 U.S.C. (Supp. III) 5317(c), alleging that Raul Arvizo-Morales filed a report under 31 U.S.C. (& Supp. III) 5316 containing a material misstatement or omission when he transported $194,209.04 in monetary instruments from Mexico to the United States. After a bench trial in the United States District Court for the Western District of Texas, the court ordered the forfeiture of the amount in question. The court of appeals affirmed.

1. The facts are summarized in the opinions of the court of appeals and district court (Pet. App. 4A-5A, 14A-15A). Raul Arvizo-Morales is an employee of Casa de Cambio Juarez, a money exchange business located in Juarez, Mexico. On April 23, 1986, Francisco Arvizo-Morales, the principal owner of Casa de Cambio and Raul's brother, told Raul to take certain funds to the Texas Commerce Bank in El Paso, Texas. Raul Arvizo-Morales then completed the Customs Form 4790 Report of International Transportation of Currency or Monetary Instruments, indicating that Casa de Cambio was depositing currency of $172,081.04 and checks totaling $70,772.55 into its account at the Texas Commerce Bank.

Shortly before Raul Arvizo-Morales departed, his brother told him to take $19,685.04 from the currency and to deliver it to Don Peso's Money Exchange House in El Paso as payment for pesos purchased by Casa de Cambio a day earlier. Raul counted out a sum of money and placed it in a paper grocery bag, leaving the rest of the currency and the checks in a nylon sports bag. He then left for El Paso without revising the Form 4790 report to reflect that the money was being taken to two different destinations.

When Arvizo-Morales arrived at the border, he presented the Form 4790 report to the Customs agent. After

reviewing the report, the agent asked whether the report was correct, and Arvizo-Morales replied that it was. The agent then asked Arvizo-Morales to get the currency and checks so that he could verify the amounts. Arvizo-Morales went back to his truck, and he returned with the two bags. The agent asked whether all the money in both bags was being taken to the Texas Commerce Bank, and Arvizo-Morales indicated for the first time that $19,685.04 in the grocery bag was being taken to Don Peso's. When asked why he had not disclosed that information on the form, Arvizo-Morales shrugged his shoulders and replied that he should have done so. The agent counted the currency in both bags, and he found $20,685.04 – $1000 more than Arvizo-Morales had mentioned – in the grocery bag. The agent and Arvizo-Morales then separately counted the currency, and each came out with a total of $1000 more than the amount declared on the form. At that point, Arvizo-Morales made a request to change the Form 4790 report. Denying that request, the agent seized all of the currency and checks because the reported amount of currency was off by $1000 and the report neither listed Don Peso's as a destination nor indicated that Arvizo-Morales was acting as an agent for Don Peso's.[1]

2. The district court ordered the $173,081.04 in currency and a personal check in the amount of $21,128 forfeited because the Form 4790 report submitted by Arvizo-Morales failed to list Don Peso's as a destination for part of the currency (Pet. App. 13A-19A). The district court found that Arvizo-Morales' "misstatement was 'knowingly' made," since Arvizo-Morales knew about the reporting requirements and was also aware of the misstate-

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[1] The agent subsequently returned nonnegotiable checks totaling $46,644.49 because such checks need not be reported on Form 4790. See 31 U.S.C. 5312(a)(3).

ment concerning the destination of the currency (*id.* at 16A-17A). The district court also found that the misstatement was material because "it related to matters which are central to the reporting requirement" (*id.* at 17A).

The district court also rejected petitioners' argument that the agent was obligated to allow Arvizo-Morales to amend the Form 4790 report after he admitted his misstatement, because the court found "no support for this position in the law or regulations" (Pet. App. 17A). The district court also rejected petitioners' claim that only the $19,685.04 destined for Don Peso's should be forfeited, since 31 C.F.R. 103.48 makes clear "that all the monetary instruments being transported in one 'batch' are subject to seizure and forfeiture if a material misstatement or omission is made with respect to any part of the transaction, and that the Secretary of the Treasury, not the trial court, has the discretion to remit or mitigate forfeiture" (Pet. App. 19A).

3. A divided panel of the court of appeals affirmed the forfeiture but on reasoning somewhat different from that of the district court (Pet. App. 3A-12A). The court first rejected petitioners' claim that forfeiture was unwarranted because the failure to list Don Peso's as a destination was the result of an accident, inadvertent mistake, or innocent error. The court agreed that a party must have knowledge of the reporting requirements before his money is subject to forfeiture under Section 5317(c), but concluded that the statutory language "does not require examination of the party's mental state and the district court's finding of a 'knowing' misstatement was therefore unnecessary" (Pet. App. 7A). The court accordingly held that "the claimant's money became subject to forfeiture when Arvizo-Morales tendered the materially incorrect Form 4790 to [the agent], regardless of whether the reporting error was intentional or inadvertent" (*ibid.*).

The court of appeals also rejected petitioners' claim that Arvizo-Morales had successfully amended his Form 4790 report under 19 C.F.R. 148.16 when he told the agent before the bags were inspected that the currency in the grocery bag was destined for Don Peso's. The court observed that, "[a]lthough the Treasury Department might sensibly promulgate a regulation permitting amendments to Form 4790 reports for the purpose of correcting inadvertent errors, it has not done so, and there is no suggestion in the language of 19 C.F.R. § 148.16 or elsewhere that renders it susceptible to application in currency forfeitures" (Pet. App. 7A).[2]

Judge Politz dissented (Pet. App. 10A-12A). Without identifying any specific statute or regulation to support his view, Judge Politz suggested that Arvizo-Morales should have been entitled to correct any innocent errors or omissions in his Form 4790 reports. He concluded that the "purpose of the currency disclosure legislation is not served by today's harsh result" (Pet. App. 12A).

ARGUMENT

1. Petitioners first contend (Pet. 6-11) that monetary instruments may not be forfeited under 31 U.S.C. (Supp. III) 5317(c) unless the material misstatement or omission on the filed report was knowingly made, rather than the result of an accident, inadvertent mistake, or innocent error. The court of appeals correctly rejected that contention.

At the time of the seizure and forfeiture in this case, Section 5317(c) provided that "[a] monetary instrument being transported may be seized and forfeited to the

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[2] The court also agreed with the district court that all of the $194,209.04 at issue, and not just the portion of that money that was destined for Don Pedro's, was subject to forfeiture (Pet. App. 7A-9A). Petitioners have not challenged that holding in this Court.

United States Government when a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement."[3] Unlike other currency reporting provisions, the language of Section 5317(b) provides no basis for concluding that the filing party must knowingly make the misstatement or omission in the report. Cf. 31 U.S.C. 5316(a) ("knowingly * * * transports"); 31 U.S.C. 5322 ("willfully violating"). Indeed, the plain language of Section 5317(c) requires only that the misstatement or the omission in the report be "material"—as it concedely was in this case (see Pet. App. 5A-6A)—before the filing party's monetary instruments become subject to forfeiture. Consequently, once the filing party enters the United States and presents a report containing a material omission or misstatement, Section 5317(c) authorizes the forfeiture of the monetary instruments regardless of whether the reporting error was intentional or inadvertent.[4]

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[3] The first sentence of Section 5317(c) was amended effective October 27, 1986, by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, § 1355, 100 Stat. 3207-22, and now provides (31 U.S.C. (Supp. IV, 5317(c)):

> If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government.

[4] Petitioners rely (Pet. 8-9) on the legislative history and the decision in *United States* v. *One Lot of $24,900 in U.S. Currency*, 770 F.2d 1530 (11th Cir. 1985), to demonstrate that Congress intended that the filing party have knowledge of the reporting requirements before a forfeiture is authorized. That demonstration does not help them, however, since the court of appeals agreed with that proposition (Pet. App. 6A). And, as the court of appeals observed, it was undisputed in this case that petitioners were "well aware" of the reporting

At bottom, petitioners' claim (Pet. 10-11) is simply that a forfeiture is unduly harsh when the misstatement or omission in the report is the result of an accident, inadvertent mistake, or innocent error.[5] Although we agree that a forfeiture in such circumstances can sometimes be harsh, the Secretary of the Treasury is authorized to exercise his discretion to remit or mitigate any forfeiture "in whole or in part upon such terms and conditions as he deems reasonable." 31 C.F.R. 103.48; see also 31 U.S.C. 5321(c) ("[t]he Secretary may remit any part of a forfeiture" under Section 5317(c)). As the court of appeals noted (Pet. App. 8A n.7), it appears that Congress intended that forfeitures for mistaken or innocent violations of Section 5317(c) be remedied through that administrative mechanism. S. Rep. 91-1139, 91st Cong., 2d Sess. 7 (1970) (The Secretary has discretion to remit any part of a forfeiture "to prevent ordinary citizens or businessmen from being unduly penalized for an inadvertent violation."); see also H.R. Rep. 91-975, 91st Cong., 2d Sess. (1970). Because that administrative scheme is expressly designed to mitigate the harsh effects of forfeitures that are based on innocent or inadvertent misstatements, the court of appeals correctly concluded that it would be inappropriate to infer that Section 5317(c) itself, contrary to its plain language, requires

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requirements; the only dispute was whether the particular misstatement contained in the Form 4790 report constituted a knowing violation of those requirements (*ibid.*).

[5] Petitioners' suggestion (Pet. 11) that their position is similar to that of other travelers who might face forfeiture for innocently omitting their date of birth on the form or failing to enter the proper date of the form rests on an obviously flawed analogy. Unlike petitioners' failure to list the proper destination of all the currency, a traveler's omission of his date of birth or failure to date the report would not be considered a "material" omission or misstatement in the absence of unusual circumstances.

that a material misstatement in the report be knowingly made.[6]

2. Petitioners also contend (Pet. 8, 11-14) that monetary instruments may not be forfeited under Section 5317(c) if the report is orally amended before the discovery of any material omission or misstatement in the report. That contention is plainly without merit.

Petitioners' contention that a report under Section 5316 may be orally amended is based solely on a tariff regulation, 19 C.F.R. 148.16, which allows a passenger to add an article to his declaration in certain limited circumstances.[7] By its terms, however, that regulation does not apply to a report filed under 31 U.S.C. (& Supp. III) 5316. As the court of appeals concluded, "there is no suggestion in the language of 19 C.F.R. § 148.16 or elsewhere that renders it susceptible to application in currency forfeitures" (Pet. App. 7A). Moreover, nothing in the currency reporting regulations even remotely suggests that a report can be

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[6] We note that the court of appeals expressly ruled that its decision in this case was "entered without prejudice to claimants' exercise of administrative remedies" (Pet. App. 9A (footnote omitted)).

[7] 19 C.F.R. 148.16 provides:

> (a) *Before examination.* A passenger shall be permitted to add an article to his declaration if, before examination of his baggage has begun, the fact that the article has not been declared is brought to the attention of the examining officer by the passenger.
>
> (b) *After examination is begun.* A passenger shall be permitted to add an article to his declaration after examination of his baggage has begun if, before any undeclared article is found, the passenger advises the examining officer that he has such an article and the officer is satisfied that there was no fraudulent intent. Under no circumstances shall a passenger be permitted to add any undeclared article to his declaration after such article has been discovered by the examining officer.

orally modified once it is filed upon entry into the United States. Cf. 31 C.F.R. 103.26(b) (filing of reports). The court of appeals therefore correctly rejected petitioners' contention that Arvizo-Morales validly amended his Form 4790 report when he told the agent that the currency in the grocery bag was destined for Don Peso's.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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